BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAUL REDGATE	)	
Claimant	)	
VS.	)	
	)	Docket No. 217,691
UNITED PARCEL SERVICE	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appealed Administrative Law Judge John D. Clark's Award dated November 24, 1997. The Appeals Board heard oral argument by telephone conference on June 3, 1998.

APPEARANCES

Claimant appeared by his attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric T. Lanham of Kansas City, Kansas. There were no other appearances.

RECORD

The Appeals Board has considered the record listed in the Administrative Law Judge's Award.

STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Administrative Law Judge's Award. In addition, at the December 5, 1996, preliminary hearing, the parties stipulated, at the same time claimant was injured while working part-time for the

respondent, he also was working part-time for Centeon Bio-Services earning an average gross weekly wage of $179.14. The parties further stipulated the work claimant performed for the respondent and for Centeon Bio-Services was not the same or similar type of work.

ISSUES

The correct amount of the weekly compensation rate for temporary partial general disability was the single issue before the Administrative Law Judge and is now the single issue before the Appeals Board for review.

The parties' stipulated that claimant sustained a 10 percent permanent partial impairment as a result of his work-related injuries. However, the Administrative Law Judge did not compute the Award for permanent partial general disability based on the stipulated 10 percent permanent functional impairment rating. At oral argument, the parties agreed the Appeals Board should compute the Award on that basis, and a credit should be allowed for the amount of temporary partial general disability found to be appropriate by the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Claimant was injured while employed by the respondent on May 28, 1996, and August 20, 1996. After the August 20, 1996, injury, claimant was restricted from lifting over 25 pounds. On August 21, 1996, the respondent took claimant off work because it could not accommodate that weight restriction. At the December 5, 1996, preliminary hearing, claimant requested temporary partial general disability benefits. The Administrative Law Judge ordered respondent to pay claimant temporary partial disability benefits in the amount of $147.41 per week.[1]

Claimant was paid 21.14 weeks of temporary partial disability at the rate of $147.41 per week or $3,115.76. The focus of the dispute in this case is whether claimant's weekly temporary partial disability rate is computed by using the pre-injury average gross weekly wage claimant earned while he was employed part-time for the respondent or by also including the average gross weekly wage claimant earned working part-time for Centeon Bio-Service. Weekly compensation for temporary partial general disability is determined as set forth in K.S.A. 1996 Supp. 44-510e(a) which provides in pertinent part as follows:

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[1]The parties stipulated that claimant's pre-injury average gross weekly wage while employed by the respondent was $221.79 per week. 66⅔% of $221.79 computes to $147.87 per week instead of the $147.41 per week found by the Administrative Law Judge.

> . . . shall be 66⅔% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, . . .

At the same time claimant was working part-time for the respondent and earning an average weekly wage of $221.79, he also was working part-time for Centeon Bio-Services earning an average weekly wage of $179.14. Claimant's work-related injuries temporarily disabled him from working for respondent but did not disable him from continuing to work for Centeon Bio-Services. Therefore, claimant was not eligible for temporary total disability benefits because his injuries had not rendered him completely and temporarily incapable of engaging in any type of substantial and gainful employment. *See* K.S.A. 44-510c(b)(2).

The Appeals Board finds and the parties agree the temporary weekly benefits that claimant was entitled before he met maximum medical improvement are temporary partial disability benefits as determined by K.S.A. 1996 Supp. 44-510e(a) and not temporary total disability benefits as determined by K.S.A. 44-510c(b)(2). Claimant, however, claims and the Administrative Law Judge agreed that claimant's pre-injury average gross weekly wage, for the purpose of calculating claimant's weekly temporary partial disability rate, should be the total of those two part-time jobs and not just the one part-time job where he was working when he was injured. The Administrative Law Judge calculated claimant's average gross weekly wage for purposes of computing the weekly temporary total disability rate in the amount of $400.93 instead of $221.79, which was claimant's pre-injury wage while employed by the respondent. The Administrative Law Judge then found claimant's temporary partial disability weekly compensation rate of $147.41 by taking 66⅔ percent of the difference between the total average gross weekly wages of both part-time employments of $400.93 and the average gross weekly wage of the Centeon Bio-Services employment of $179.14 or $221.79.

Respondent, on the other hand, contends K.S.A. 1996 Supp. 44-510e(a) is clear and unambiguous in determining the weekly compensation rate to be paid a claimant when he is temporarily and partially disabled. In this case, respondent asserts claimant's weekly compensation rate for temporary partial general disability is $28.43. Claimant's average gross weekly wage while employed by the respondent was $221.79. After his injury, claimant was actually earning $179.14 per week while employed by Centeon Bio-Services. The difference between those two average gross weekly wages is $42.65 and 66⅔% of $42.65 is $28.43. Therefore, respondent contends claimant was temporarily and partially disabled for 21.14 weeks at the rate of $28.43 per week.

Claimant argues the legislature did not contemplate the situation that exists in this case where the employee was injured while employed by two part-time employers at the same time. Claimant asserts that the earnings he lost because of his injuries is the $221.79 per week he was earning while employed by the respondent. Claimant argues it is unfair to compute claimant's temporary partial weekly compensation rate as set forth in

K.S.A. 1996 Supp. 44-510e(a). Claimant contends his weekly temporary total disability compensation rate should be 66⅔ percent of his actual wage loss of $221.79 or $147.87 per week and not $28.43 per week.

The Appeals Board agrees the statute is probably unfair as applied to these particular facts. Nevertheless, the Appeals Board agrees with the respondent's argument that the statute must be followed as written. The Appeals Board finds 1996 Supp. K.S.A. 44-510e(a) is clear and unambiguous in regard to the computation of the weekly compensation rate for temporary partial general disability. The Appeals Board also concludes the legislature did contemplate a situation, as in this case, where the claimant was employed at the same time in two part-time jobs. K.S.A. 44-511(b)(7) provides if a claimant performs the same or a very similar type of work on a part-time basis for each of two or more employers, and is injured, his total average gross weekly wage will be the total of the part-time employments. The Appeals Board finds a policy decision was made by the legislature to include the total of all part-time employers in an injured employee's pre-injury average gross weekly wage if the employee was performing the same or similar work in those part-time employments. But not to include all part-time employers when the injured employee was not performing the same or similar work. As previously noted, the parties stipulated claimant was not performing same or similar work while employed by his part-time employers. Therefore, claimant's pre-injury average weekly wage is based on the weekly wage claimant was earning while employed by the respondent and not the total of the weekly wages earned from both the respondent and Centeon Bio-Services.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge John D. Clark's November 24, 1997, Award, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of claimant, Paul Redgate, and against the respondent, United Parcel Service, and its insurance carrier, Liberty Mutual Insurance Company, for accidental injuries which occurred on May 28, 1996, and August 20, 1996, and based upon an average weekly wage of $221.79.

Claimant is entitled to 4.06 weeks of temporary total disability compensation at the rate of $147.87 per week or $600.35, (this is a conversion of the 21.14 weeks of temporary partial disability paid at $28.43 per week.), followed by 41.5 weeks of permanent partial general disability at the rate of $147.87 per week or $6,136.61 for a 10% permanent partial general disability, making a total award of $6,736.96, which is all due and owing and is ordered to be paid in one lump sum.

All remaining orders contained in the Administrative Law Judge's Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority's decision. I do not believe the legislature contemplated this factual situation. In order to give the statute a reasonable interpretation, I would only consider the pre- and post-injury wages from UPS in determining the amount of temporary partial disability benefits due claimant. In the alternative, one should include both the UPS and Centeon wages in the pre- and post-injury wage computation. Either method is better than that utilized by the majority in determining the wage loss, which temporary partial is theoretically intended to offset.

BOARD MEMBER

DISSENT

I would affirm the decision by the ALJ awarding the claimant temporary partial disability benefits. In my view, the primary purpose of the temporary partial disability statute is to authorize benefits and provide a method for calculating benefits in cases where an employee returns to work after the injury at a reduced wage (often part-time) before he or she reaches maximum medical improvement. I do not think the legislature intended the general language of the statute to be imposed on the more unusual circumstance of an employee who is working two jobs at the time of the injury.

But it does appear to me that the calculation approved by the ALJ implements the policy the legislature intended. The statute provides the employee is to receive a percentage of the employee's net wage loss. The calculation adopted by the majority, on the other hand, deducts from the wage loss the wages the claimant did not lose. The difference is illustrated by considering an employee who earns $400 per week at the time of the injury by working two jobs each paying $200 per week. If the employee is not able to work the job on which he was injured and loses $200 per week but remains able to work the other job for $200 per week, the majority's calculation method would give this employee no benefits. The $200 per week the employee retains would be deducted from the wage the employee lost ($200 - $200 = $0) and two-thirds of the difference would be zero. On the other hand, the employee who earns $400 per week in one job and then after the injury accepts some other job at $200 per week will receive benefits of $133.34 per week ($400 - $200 = $200 x 66⅔% = $133.34). Both employees have the same loss of income due to the injury, but they are not treated equally by the majority's calculation. The application in the present case has the same unfairness, only to a lesser degree.

I recognize there are other factors supporting the majority's view. The calculation adopted by the ALJ, for example, yields a temporary partial disability benefit identical to the temporary total disability benefit. The majority's calculation is also arguably more consistent with the dual-employment wage calculation in K.S.A. 44-511. Nevertheless, the majority's calculation does not, in my view, coincide with the intent of the statute. I believe the calculation approved by the ALJ does.

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Eric T. Lanham, Kansas City, Ks
John D. Clark, Administrative Law Judge
Philip S. Harness, Director